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No. 65

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1943

CRESCENT EXPRESS LINES, INC., APPELLANT

*v.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

## Reply Brief of Appellant Crescent Express Lines, Inc.

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## Reply Brief of Appellant Crescent Express Lines, Inc.

Appellant Crescent Express Lines, Inc., in reply to the briefs submitted by appellees, United States of America, Interstate Commerce Commission, Hudson Transit Lines, Inc., and Mountain Transit Corporation does respectfully allege the following:

### In Reply to the Brief of the Appellees, United States of America and Interstate Commerce Commission:

The appellees, United States of America and the Interstate Commerce Commission, served a joint brief in opposition to the brief of the appellant. It is necessary that appellant answer said brief in some detail to prevent any misunderstanding of the issues involved herein.

The case at bar is distinguishable from any other by reason of the fact that the lower Court expressly found

that appellant has the right to operate from fixed stations in the Bronx or elsewhere (R. 30, 35). The lower Court held that service can be made from *fixed terminals*, and that fact is conceded by said appellees in the foot note on page 8 of their brief, and at the same time they contend that we are properly limited to door-to-door service. The right to operate from fixed terminals is one of the material issues raised by appellant, and that right has been sustained by the lower Court although the lower court erroneously dismissed the complaint. Door-to-door service is not a service from terminals as contended by appellant; appellant goes to Court and its right to render a service from terminals is sustained but its complaint is dismissed. WHY? The right to use fixed terminals is an issue in this case, because in connection therewith the right to use larger vehicles becomes more clear. The entire argument made by said appellees as well as the other two appellees, is the special nature of the service alleged to have been rendered by appellant's predecessors in a door-to-door service taking people from their homes to their hotels or vice versa, but the lower Court held with the appellant that its right to operate from fixed terminals is justified. The holding is placed on the ground that terminal service is the same as door-to-door service because it really goes from door-to-door anyway. Appellant claimed and proved that its service was between fixed termini, and therefore the Commission made an error in issuing its order of September 2, 1941, prescribing the authorized service as door-to-door service. The fact that appellant's service was between fixed termini was recognized by the order of June 20, 1938 which properly described the authority to which appellant was entitled.

At pages 9 to 11 inclusive of said appellees' brief there is a recital of the confusion of the Commission in arriving at an interpretation of its power to restrict the right

of a carrier to use any kind of equipment. The recital of the changes of decisions by the Commission does not establish that the final result was correct; it does establish that there is a vital need for a final and definite determination by this Court so that citizens of the United States who are subject to the motor carrier laws can be guided thereby. The statement made in the second paragraph on page 10 that the Commission in the case at bar was merely substituting its conclusions in some other case to the case at bar demonstrates the extent of the error herein. The evidence herein is different from the *Nudelman* case, 28 M. C. C. 91, by reason of the fact that there was no terminal service in the *Nudelman* case and the service was solely confined to a door-to-door service. Any statements made by the Commission with respect to the *Nudelman* case was based upon the evidence in that case, and there is no showing that the evidence in that case is the same as in the case at bar. The concession therefore made by appellees, United States of America and the Interstate Commerce Commission, that the Commission merely substituted its conclusions made in another case, and without any finding of fact that the evidence in the *Nudelman* case was the same as in this case, requires a reversal of the judgment herein.

## In Reply to That Portion of Said Appellees' Brief Under "Argument".

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### In Reply to Point I.

Under Point I of said appellees' brief, they contend that the Commission merely limited appellant to the same kind of service conducted on the grandfather date. In support of that argument they advance the idea that the Commission really did not limit the type of equipment,

but merely described the service to be rendered. Said appellees' entire argument proceeds upon the assumption that the Commission was only concerned with describing the service to be authorized but the difficulty with that position is the fact that the so-called description of the service to be rendered was primarily concerned with the limitation of the right to use any type of equipment on the part of the appellant even though Section 208a of the Motor Carrier Act of 1935 gave the appellant the right to expand and add to its equipment and facilities. Section 203 (a) 13 defines a motor vehicle without reference to size or style. The lower court and appellees try to interpret the proviso contained in Section 208a as though it only gave the right to increase the quantity of the service but that carriers cannot change the type or size of the vehicle from that used on the grandfather date. The construction is so narrow that it requires the judicial interpolation of the word quantity of service whereas the proviso is broad and clear and does not require any judicial interpretation.

We should consider the question of whether the use of different size vehicles is within or without the meaning of Section 208a of the Motor Carrier Act of 1935. Appellant's position is that it has the right to use any kind of vehicle without regard to whether the vehicle was in use or even in existence on the grandfather date, and that the use of larger vehicles does not *per se* constitute a change in the type of service rendered on the grandfather date; further, that the mere fact that appellant's vehicles may have carried 6 or 7 or 8 or less passengers at one time, does not mean that appellant should be limited to that precise number of passengers to be carried in the future. In fact, there is no proof of how many passengers were carried on the critical date of June 1, 1935, and they may have been more or less than 6. The limitation does not establish the type of service rendered

because the transportation of a passenger from the terminal in the Bronx to a terminal at Woodridge in the mountain area is effected by using a small or a large vehicle but the service rendered is the same without regard to what kind or size of vehicle is used. The lower Court even goes to the extent of holding that quality of the service cannot improve above that given on the grandfather date. See page 10 of appellant's main brief. The attention of this Court is called to the fact that the lower Court held that appellant had the right to operate from fixed terminals. There is therefore not even the slightest difference between the operations of appellant from fixed terminals, and the operations of any company using buses from fixed terminals. The service would be the same. That is the key to this case. Even though the service would be the same, the Commission has so drawn the order of September 2, 1941 that even though there is no change in the type of service the appellant is to be "frozen" to the use of small vehicles or at least to the limited transportation of a small number of people. The number of people carried does not establish the type of service. The Commission has not restricted companies which used 29 passenger buses on June 1, 1935, from using 41 passenger buses or from using 20 passenger buses, and the order of the Commission is unjustified in restricting appellant from carrying more than 6 passengers at one time. Trucking companies can use 10 ton trucks, even though they used only 1 ton vehicles on the grandfather date. Appellees and the lower court go upon the assumption that if the Commission cannot restrict the appellant to the use of one type of vehicle all regulation will be destroyed. Frequently when cases come before the courts where the law is clear the Courts render opinions wherein the remedy is stated to be legislative, and that the aggrieved litigant is advised to seek re-

dress by having the statute amended no matter how much difficulty an indibidual would have to go to. In the case at bar Congress enacted Section 208a of the Motor Carrier Act of 1935. The proviso therein is clear; so clear, in fact, that the Commission itself rendered the decision in the *Nudelman* case, 22 M. C. C. 275, and in the *Sullivan County Highway* case, 21 M. C. C. 717, to the effect that Commission had no right to restrict a carrier, directly or indirectly, to the use of one type of vehicle. The Transportation Act of 1940 reenacted Section 208a with the same proviso. After the enactment of the Transportation Act of 1940, the Commission in 1941 changed the *Nudelman* and the *Sullivan* decisions. The reenactment of a statute after a court interpretation thereof is evidence that that interpretation was intended by the legislative body in reenacting the statute. Here we have the clear meaning of Section 208a of the Motor Carrier Act of 1935, in which the proviso referred to was deliberately inserted by the Senate (79 Cong. Rec. 5663) and then the interpretation thereof by the Commission. Congress reenacted the same statute, *and then the Commission changed its decisions.* We submit that if the situation had been reversed that appellees would then contend that the reenactment was intended as Congressional approval of the Commission's interpretation. If the Commission is dissatisfied with Section 208a and if wants more power it will get a much quicker hearing from Congress than an ordinary litigant seeking an amendment of a statute. Appellant must look to the Courts for relief especially where the Commission has exceeded its powers.

At the bottom of page 14 of said appellees' brief they endeavor to explain the incongruous provision of the order complained of with respect to carrying children under 10 years of age, if they do not occupy a seat. The small child sitting on its mother's knee can be carried but the child must be under 10 years of age; in these

times, the Court can take judicial notice that 10 year old children, even 5 year olds, are too big to sit on anyone's lap.

On page 16 of said appellees' brief, third paragraph, is the statement that appellant does not dispute the facts of its operations, but the record is clear that appellant has asserted its clear right to the order of June 20, 1938 and its opposition to the order of September 2, 1941. Appellant has always alleged that the order of June 20, 1938 was the correct description of its rights and there never was any opposing evidence.

The expert opinion of regulatory bodies which the courts are reluctant to disagree with cannot override the clear mandate of the law. The order involved therein is aimed at one thing only, and that is, that carriers using small vehicles on the grandfather date shall be prevented from using larger equipment and so prevent their competing with carriers using buses regardless of the type of service. This is not regulation and is squarely within the decision in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 481:

> "This does not mean that the right to the statutory grant may be withheld or cut down because the Commission disapproves of the competitive conditions which may be created if the application is granted."

Appellees place stress upon the decision in the case of *Noble* v. *United States*, 319 U. S. 88. Firstly it involves the limited rights of a contract freight carrier serving a few special types of customers; and secondly, appellant is not restricted to serving only a few special customers but has the right to serve all passengers seeking transportation in a common carrier service.

Reference is made to the case of *Royal Cadillac Service, Inc.*, 317 U. S. 595, at page 20 of said appellees'

brief as being controlling here. That case is not pertinent here because in that case the Commission allegedly placed its decision denying grandfather rights upon the ground that there had been a change in the type of operations after the grandfather date *and not because there had been a change in the type of vehicle used.* The use of fixed termini was apparently not established as in the case at bar, because here the lower Court expressly found that appellant had the right to render a terminal service whereas in the *Royal* case there was no such finding. In fact in the *Royal* case, the Commission and the lower Court found that the use of terminals was different from the service rendered on the grandfather date. This Court in granting the motions to affirm the *Royal* case rendered a memorandum decision which denied review upon the premise that where there is a conflict in the evidence, this Court will not disturb the decision nor will it substitute its judgment for that of the Commission.

The restriction to carrying only 6 passengers cannot find support in the case of *United States* v. *Maher*, 307 U. S. 148, because that case did not even attempt to interpret the provision in Section 208a of the Motor Carrier Act of 1935. At page 21 of said appellees' brief reference is made to that case to justify the imposition of restrictions. In this case, appellant is complaining that the Commission has gone beyond its statutory power and imposed illegal restrictions so that the issue is far different from the *Maher* case. The certificate shall specify the service to be rendered, but even then the Commission has itself been limited by the proviso to Section 208a so that any avoidance of that restriction by the Commission is illegal. Said appellees contend that substantial parity must exist between the operations authorized and those conducted on the grandfather date. That is true but appellant here is asserting that in addition thereto no limitation can be placed upon it restricting an increase

of its operations to any extent so long as the same type of service is rendered. The bulk of the business is done in July and August and is between New York City on one hand and Monticello and Liberty in the Mountain area on the other. The volume is so great that hundreds of vehicles are dispatched daily between these points. In view of the fact that appellant has the right to operate from terminals it can operate between New York City and Monticello and Liberty but subjected to the impossible burden of carrying only 6 passengers. The lower Court erred in dismissing the complaint *in toto* while holding that appellant had the right to operate from terminals (R. 30, 35).

The said appellees refer to the case of *United States v. Maher*, 307 U. S. 148, 155, as holding that actual practice of an industry is a means of construing a statute, but that hardly controls in this case because the Commission itself in interpreting Section 208(a) of the Motor Carrier Act of 1905 ruled that it had no power to restrict a carrier from adding any kind of vehicle to increase its facilities. See *Sullivan County Highway Lines*, 21 M. C. C. 717, *In re Nudelman*, 22 M. C. C. 275. The change of these two decisions by the Commission did not mean that the subsequent decisions were correct interpretations of Section 208(a) of the Motor Carrier Act of 1935.

There is one further matter to answer under Point I of said appellees' brief. Appellees in a footnote on page 24 of their brief discuss the meaning of the descriptive term "special and charter operations" which is apparently intended as a reply to Point V of appellant's brief set forth at pages 35 to 39, inclusive, thereof. The order of September 2, 1941, which is the subject of the within action, described appellant's right to operate as "special operations". Appellant set forth in its complaint paragraph 22 (R. 8) that the use of said term was arbitrary, meaningless and inapplicable, and was vague, uncertain and ambiguous, and was prejudicial to appellant's rights.

The said appellees in the footnote set forth their meaning of special operations and charter operations. A better understanding of the meaning of special operations is obtained by considering what said appellees (p. 24 of their Brief), give as the meaning of both terms:

> "Charter service contemplates the transportation of groups, such as lodges, bands, athletic teams, schools, or other travel groups, assembled by someone other than the carrier, who collectively contract for the exclusive use of certain equipment for the duration of a particular trip or tour. Special service, on the other hand, contemplates that service rendered generally on week-ends, holidays, or other special occasions to a number of passengers which the carrier itself has assembled into a travel group through its own sales to each individual passenger of a ticket covering a particular trip or tour planned or arranged by the carrier."

The said definition is precisely what the term "special operations" means. It is immaterial whether special and charter operations are one or two types because appellant conducts neither kind. Said appellees fail to point out any error in appellant's position contained in Point V of appellant's brief. Appellant does not rent out entire vehicles to groups such as lodges, bands, etc., to carry them to points of their selection and return; that eliminates charter service. Appellant does not arrange a "particular trip or tour" and sell tickets therefor; that eliminates special operations. Appellant conducts a common carrier service selling tickets to all who buy same, makes trips every day, takes different passengers in one direction and others in reverse direction, takes passengers to different towns en route, and takes them from different

towns en route; charges different fares to each passenger depending on destination and length of trip; in short, there is no difference between appellant's service and that rendered by any other common carrier by rail or bus and the use of the term "special operations" is a misnomer. The lower Court has erroneously interpreted the term "special operations" as meaning operations over irregular routes (R. 33, 35). The lower Court has apparently separated itself from the interpretation used by the Commission, and the error as claimed by appellant is emphasized by the appellees' definition of special operations in their brief on page 24. Appellant's operations are not "special" at all but are plain common carrier operations, heretofore conducted on a small scale, and the natural growth and development thereof is prevented by the application of illegal restrictions and inappropriate and ambiguous terminology.

**In Reply to Point II of Brief of Appellees, United States of America and Interstate Commerce Commission.**

Under this point effort is made to create the impression that service was radial by referring to the map attached to the supplemental application (R. 49). The territory included in the circle marked on the map consists of a large number of small towns, villages and hamlets. The route between New York City and Wurtsboro is a single road. It is used by all operations without regard to whether the rights issued are described as over regular or irregular routes. At Wurtsboro the main Route 17 continues to Monticello, Liberty and Livingston Manor. At Monticello, Route 42 runs to Woodbourne and then via 52 to Liberty. At Monticello Ronte 17B goes to Maplewood, White Lake, Bethel and Fosterdale. All points along these roads are served. All operators use these roads. Appellant's service to these villages or towns is a service

to fixed termini. The advertisement card (R. 80) clearly shows this although said appellees' brief omits the material section of the card. The entire card in full reads as follows:

7 PASSENGER CARS 7

Leaving daily to all parts of the
MOUNTAINS at lowest prices

| | | |
|---|---|---|
| Monticello | Liberty | Ellinville |
| Ferndale | Swan Lake | Kerhonkson |
| Loch Sheldrake | Fallsburg | Accord |
| Parksville | Livingston Manor | Kiamicha |

FROM YOUR HOME TO YOUR HOTEL

Board and Rooming Accommodating if Desired

Please call to see us at our residence about reservation

Name..... Address.....
Date ..... Time..... Apt.....

CRESCENT MOUNTAIN SERVICE
531 E. 169th St.
Bronx, N. Y.
Tel. JEROME 6-8445-8451
Mountain Tel. Fallsburg 186 W

The villages and towns served are clearly listed by name. To accommodate passengers desiring boarding houses, arrangements could be made through the carrier, but the heavy lines on the card show the difference between service to the various villages and the arrangements that could be made for hotel accommodations. The books of the partnership (predecessors of appellant) in no wise changed the picture. Reservations of space by passengers does not create a different type of service. The

same method is employed by innumerable so called regular route carriers such as Greyhound, All-American Lines and many others. Appellant's predecessors offered sufficient proof to convince Division 5 twice that a proper certificate should be issued and the Commission issued its orders of May 7, 1938 and June 20, 1938 granting a certificate properly describing the rights which should be issued.

The procedure followed by the Commission was irregular in view of the fact that it changed its order of June 20, 1938 without any evidence to justify the change. The lower Court erroneously found that the Commission gave notice of new hearing (Finding of Fact No. 6, R. 29 and R. 31). There is nothing in the record to support this finding. For the first time we learn the basis for this situation in the said appellees' brief at page 27 where reference to the alleged hearing is made as follows:

"See R. 121, 31."

We ask the Court to check R. 121 and 31. At R. 121 there is the unverified Reply to Protest of Mountain Transit Corporation filed October 17, 1941 in which there is reference to an alleged hearing on December 1, 1938. There is no such notice in the certified transcript of the record supplied by the Interstate Commerce Commission to appellant in this case. Based on this unverified paper, the lower Court in its decision at R. 31 refers to the hearing on December 1, 1938. The said appellees, United States of America and Interstate Commerce Commission, do not refer to any other part to support this alleged hearing, and the lower Court in making part of Finding of Fact No. 6 (R. 29) acted without any evidence to justify the finding. The change made by the Commission on September 2, 1941 of its order made on June 20, 1938, was unjustified because there was no evidence to support any change. The exceptions filed by Hudson Transit

Lines, Inc. (R. 107-109) and by the predecessors of Mountain Transit Corporation (R. 101-103) specifically asked for the right to disprove the evidence given by applicant as false and untrue and the printed record containing those documents is in direct opposition to the footnote in the appellees' brief at page 28 that protestants offered no evidence because they were satisfied that "applicant sought only the right to continue its special door-to-door radial, irregular route, territorial operations, conducted with vehicles carrying not more than seven passengers including driver". That footnote is incorrect and the dates of the orders and the date of the alleged hearing conclusively refute said appellees' brief. The order of June 20, 1938 was set aside by the order of September 2, 1941. The alleged hearing is supposed to have occurred on December 1, 1938. At what point and when did protestants hold back their proof that applicant desired to continue operations as a door-to-door radial 6 passenger operator? On December 1, 1938 applicant already had the order of June 20, 1938 and between June 20, 1938 and December 1, 1938 there wasn't the slightest scintilla of anything that would justify the protestants or the Commission in assuming that the order of June 20, 1938 could be nullified so far as applicant was concerned. The exceptions filed by the said protestants demanded a hearing so that they could offer proof of applicant's alleged false evidence and then when the alleged hearing is supposed to have occurred, protestants offered nothing, and the Commission has no record of said hearing. The hearing didn't occur, the lower Court acted without foundation, and now that a restricted order was issued on September 2, 1941 limiting appellant to carrying only 6 passengers, everyone, including the Commission, concedes that appellant is entitled to a certificate limiting it to carrying only six passengers at one time.

The appellees, United States of America and Interstate Commerce Commission, dispute appellant's claim to

regular route operations alleging that it is contrary to the undisputed facts and refer to the application to support their position (R. 43-52). The application is clear.

R. 43: First page shows regular fixed termini.

R. 46: Applicant reserves right to make application for any and all *additional regular* and irregular routes.

R. 47: Regular routes sought.

R. 48: Question III and answer are as follows:

"III.—If applicant (or predecessor in interest) on June 1, 1935, conducted special or charter operations, indicate the territory served and whether such operations have been conducted continuously since. No special operations."

R. 49-50: Fixed Termini—regular routes used and towns served.

Pages omitted are irrelevant to the issue.

At no time did applicant (appellant's predecessors) waive their regular route fixed termini service rights and always asserted full claim thereto. The very application on March 26, 1937 specifically demanded regular routes and if need be additional regular and irregular routes.

**In Reply to Point III of Brief of Appellees' United States of America and Interstate Commerce Commission.**

Under this point, said appellees aver that appellant has had a fair hearing because it was given the opportunity to submit briefs or petitions for review, and since the Commission denied same that constituted all the hearing needed. Further said appellees contend that even if the Commission changed its mind and issued the order of September 2, 1941 and vacated the order of June 20, 1938, it had that right (p. 32 of said Appellees' Brief).

At the outset, we call attention to the repetition of said appellees at page 29 of the proposition that protestants were not opposed to appellant's receipt of a certificate in limited form. This statement was discussed under Point II, *supra*, and was shown to be contrary to the facts. The exceptions filed by protestants (R. 101-103, 107-109) made no such concession and they always opposed appellant on every issue. There was no hearing on December 1, 1938 because if it had been held, protestants would have given some proof to support their exceptions. The absence of any such proof leaves the exceptions unproved, and certainly did not justify the Commission in setting aside the June 20, 1938 order. The error in procedure occurred on September 2, 1941 because in making the order on that date the Commission did not follow a fair and just procedure. The order of June 20, 1938 had been issued after the exceptions of Mountain Transit Corporation's predecessors had been filed. Please note in treating the exceptions of the protestants, *supra*, the dates of filing were not mentioned. It is important to note same. The order of May 7, 1938 (R. 99) was excepted to by Yelloway Transportation Corporation, *et al.*, predecessors of appellee, Mountain Transit Corporation on June 8, 1938 (R. 101). The order of June 20, 1938 (R. 103) was thereafter issued. The order of June 20, 1938 was protested to by Public Service Interstate Transportation Company and by Hudson Transit Lines (R. 105, 107). The issuance of the order of June 20, 1938 was made despite the objections of the predecessors of Mountain Transit Corporation. The subsequent objections of other objectors to the order of June 20, 1938 filed by Hudson Transit Lines were identically the same as those previously filed by Mountain Transit Corporation's predecessors to the order of May 7, 1938. The order of September 2, 1941 changed the picture without any evidence given to

justify a change. The Commission made up its mind upon the objections of Mountain Transit Corporation and issued the June 20, 1938 order, and those conclusions cannot be discarded upon the mere filing of similar objections.

The appellees, United States of America and Interstate Commerce Commission, apparently concede that the order of June 20, 1938 was correct and properly issued (R. 32) but claim that the Commission could change its mind under Section 221(b) of the Act. Changes of orders can be made but the arbitrary and capricious change of orders without regard to the rights and properties involved and without evidence to justify such action cannot find judicial approval. A change of mind by a Court upon the same evidence is possible under prescribed limits and is not allowed capriciously. Here nothing to justify a change of decision was offered or given by protestants yet the appellant's rights are interfered with to its damage. It is not required that appellant should offer more proof because its proof in sufficient amount was given to justify the order of June 20, 1938 and the burden of establishing the exceptions was on the protestants. They failed to carry the burden and in that situation, the Commission in justice and fairness was required to adhere to its order of June 20, 1938.

**In Reply to the Brief of Appellee, Hudson Transit Lines, Inc. Re: Point I.**

Under the "Statement of Case," this appellee refers to the incorrect interpretation of the statute in the *Nudelman* case, 22 M. C. C. 277 (p. 3) as though the second decision in that matter reported in 28 M. C. C. 91 was correct. In the face of the Commission's first interpretation as to what Section 208(a) meant, neither decision can really be deemed to be the right decision. It

rests with the Courts in any event to finally adjudicate what the statute means. The Commission's efforts to determine the law were so prolonged that that delay alone does not prove that the subsequent determinations are correct. The statute is clear and the protracted delay is incompatible with considering the later decision as being correct.

On page 4, this appellee reiterates the incorrect statement that the Commission issued the order "based on the uncontested facts in the Crescent application." Appellant has repeatedly pointed out in its main brief and in this reply brief that the exceptions filed by this appellee (R. 107-109) specifically disputed the facts and demanded a hearing. There never was any proof given by this appellee or anyone else to justify the setting aside of the order of the Commission dated June 20, 1938. See Finding of Fact No. 6 (R. 29). Appellant had the right to rely on its order of June 20, 1938 which was issued despite the exceptions and objections which had been filed by the predecessors of Mountain Transit Corporation (R. 101-103) to the order of May 7, 1938 (R. 99). The exceptions and objections of said Mountain Transit Corporation were identically the same as those of Hudson Transit Lines, Inc., and therefore the act of the Commission in issuing the order of June 20, 1938 must be deemed to have been made with full cognizance of the objections made to the issuance of any rights to the appellant. The fact to be considered is that there was no hearing after June 20, 1938, and even if there was, there was no proof given by this appellee to support its exceptions and protest.

The recital by this appellee under the heading of "The Issues" page 5, that appellant wants authority to conduct a type of service never rendered by it on the grandfather date is in error. Appellant wants the type of service which is rendered on the grandfather date and which the Commission twice found that it was entitled to, first, under

the order of May 7, 1938 (R. 99) and then by the order of June 20, 1938 (R. 103-105), and in addition appellant wants its rights granted by Congress under the proviso in Section 208(a) of the Motor Carrier Act of 1935 to add to its equipment and facilities, unrestricted by limitations designed by the Commission to overcome the Congressional limitation placed upon its powers. It is not improper for the appellant, a citizen of the United States, to ask for its statutory rights even though the effect thereof may displease competitors.

The opposition of this appellee is contained in three points. Under Point I, appellee disputes the construction of Section 208(a) of the Motor Carrier Act of 1935, although appellee refers to the section as contained in Part 2 of the Interstate Commerce Act. Appellee contends in substance that no change in the style of motor vehicles is possible and a carrier is frozen to the particular type of vehicle used on June 1, 1935. In this case, appellant does not claim that it can change the type of service rendered on the grandfather date, and that the use of any type of motor vehicle is permissible without regard to the type of vehicle used on the grandfather date. The appellant has the right to expand and to increase its "equipment and facilities." The lower Court has construed Section 208(a) as though the right of expansion is permissible quantitively by adding the precise type of vehicle used on the grandfather date. There is nothing in the statute to justify such a proposition, and to secure such a result, it is necessary to change the clear wording of the statute so that the right of expansion which is unlimited, is restricted to adding only the precise type of vehicle used on the grandfather date.

In order to justify the restriction, appellee claims that the preamble to the Act can be referred to because the preamble suggests that the purposes of the Act are

to foster sound economic conditions. We agree, but sound economic conditions are definitely not fostered by exceeding statutory authority or by disturbing economic conditions by changing decisions so that citizens subject to the Commission's authority are unable to know what rights they have. Chaos does not result from the exercise of statutory rights, but chaos has resulted from the efforts of competitive carriers to impede the development of the motor carrier industry under the authorization permitting expansion.

The proviso contained in Section 208(a) of the Motor Carrier Act of 1935 was intended and was inserted as the result of oversight. See report of Senate Committee, 79 Congressional Record 5663.

Section 203(a) 13 of the Motor Carrier Act of 1935 defines motor vehicles in the broadest possible terms and is all inclusive. Motor service is rendered with motor vehicles of any type which fall within the statutory definition, and the capacity of the vehicles does not indicate the type of service. The attempt to claim that the limitation of the number of people describes the service is a vain one because the type of service is separate from the equipment used. The mere fact that 6 or 7 people were carried on the grandfather date, or even less than that number, does not mean that appellant is to be forever frozen to carrying not more than 6. The appellees all proceed upon the assumption that just because that number may have been carried on the grandfather date that any certificate issued which contains that limitation is justified. This Court in the case of *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, 488, expressly held that the Commission should not freeze a carrier into the precise pattern of operations performed on the grandfather date even though the competitive situation which may result is not to the liking of the Commission or the other operators. The issue involved herein

is more important because appellant is asserting that it is entitled to a broader certificate upon the record, and upon the orders issued by the Commission on May 7, 1938 and June 20, 1938 which the protestants did not impeach or contradict by any sworn evidence; and in addition appellant is asserting its right to expand under the express authorization contained in Section 208(a) of the Act. The error of the Commission is obvious and the Court need not be restrained from acting because of any consideration for the Commission's judgment which in the case at bar exceeded the power of the Commission. The case of *Noble* v. *United States*, *supra*, is not applicable because it relates to a freight carrier whereas the case at bar relates to a passenger carrier; there the carrier tried to expand its business beyond that conducted by it on the grandfather date, whereas in this case the appellant does not wish to change the type of operations but wants a reinstatement of the order of June 20, 1938 which correctly described the rights which appellant is entitled to, and the right to expand which appellant asserts is that which is expressly granted by Section 208(a). The difference between the *Noble* case and the case at bar is that in the former the applicant tried to change the type of operations whereas here the appellant wants the right to expand the business which it conducted on the grandfather date and which did not and does not depend on the type of vehicle used or the capacity of such vehicles.

This appellee, like the others, places great reliance on the second decision of the *Nudelman* case, 28 M. C. C. 91, and the second decision in the *Sullivan County Highway* case, 30 M. C. C. 133, although the first decision in each case in 22 M. C. C. 275 and 21 M. C. C. 717 respectively, is just the other way and supports appellant. There is an enormous difference between the case at bar and all other cases cited by the appellees, and particularly different from the *Nudelman* and *Sullivan County* cases. The difference

which we point out is the fact that appellant asserted the right to operate from and between fixed termini and over regular routes as set forth in the order of the Commission dated June 20, 1938. The Commission rejected appellant's demands but the lower Court specifically held that appellant has the right to operate from any fixed stations (R. 31, 35). There is nothing like that in the *Nudelman* or *Sullivan County Highway* cases, yet the Commission took the conclusions arrived at in those cases on different evidence and applied them *in toto* to the case at bar. The lower Court erred in dismissing the complaint because its opinion and findings were different from those of the Commission and to that extent, the complaint was sustained. Operations of the appellant are therefore permissible from stations and that is wholly different from the evidence in any other case and requires that a different rule be applied rather than taking the results of other cases rendered on different evidence and applying same to the case at bar. The Commission in the *Nudelman* case said, 28 M. C. C. 91, 95:

> "Each case, of course, must be decided on its own merits."

But despite that ruling the Commission did not decide the case at bar on its merits, but used the results of the *Nudelman* case. Operations from a terminal such as that conducted by the appellant destroy the entire basis for the limitation of carriage to not more than 6 persons. The service rendered is supposed to be designed to take old, weak, and invalid persons, women and children from the homes to the actual points of destination, and also such others as wanted a service going between points of origin and destination. To this end the Commission said that the service is described by limiting it to carrying only 6 persons at one time. But the appellant operates from sta-

tions or terminals and the lower Court has so found (R. 31, 35). The reason, therefore, for the alleged restriction falls and the restriction itself falls with it. If appellant operates from a terminal there is no need for appellant to carry only 6 persons but is entitled to carry any number. The most casual reading of the decisions in the *Nudelman* and *Sullivan County* cases, *supra*, show this situation, and therefore the terminal operations of the appellant do not provide a so-called personalized service, but renders the type of service properly described in the Commission's order of June 20, 1938 which should be reinstated.

Appellant wishes to stress that passengers using appellant's service purchased individual tickets, traveled to different destinations, different passengers traveled on return trips than those using the vehicles in the first instance, passengers boarded vehicles at terminals and got off at terminals, that trips were made daily in both directions, that special trips or tours were not conducted, but that the business was a regular daily two-way service over regular routes or between fixed termini just as that rendered by any railroad or by any carrier using buses instead of smaller size vehicles.

**In Reply to Point II of the Brief of Appellee, Hudson Transit Lines, Inc.**

Under this point of appellee's brief said appellee tries to establish that the service of appellant was not over a regular route but was territorial in scope. This subject is discussed in connection with the brief of the appellees, United States of America and Interstate Commerce Commission *ante*. The application filed herein and the supplemental application (R. 43-52) do not support the appellee. As indicated *supra*, the said applications denied that any special service was rendered and described the routes

served. The map was roughly drawn and included all the towns therein indicated. The area served is highly congested during the summer season and every town therein is served and the application was supplemented by advertising such as that shown at R. 80 which specifically named each of the major towns served. The regular routes served are shown by the fixed termini listed in the application (R. 43) and by the denial of conducting special operations (R. 48). There is only one road between New York City and the mountain area which was used on all trips. The case of *United States* v. *Maher*, 307 U. S. 148, does not cover the situation because there the carrier conducted an anywhere-for-hire business making only occasional trips into Washington and in making such occasional trips he used part of a named highway. In the case at bar the appellant conducted operations in a two-way service between fixed stations which the lower Court found, even though the lower Court erroneously dismissed the complaint (R. 31, 35). The dismissal of the complaint is incompatible with the decision and findings of the lower Court, and was assigned as error herein (R. 38 Assignment of Error No. 8).

Appellant's predecessors maintained a terminal in Woodridge (R. 66-67) which is in the mountain area. The lower Court only referred to appellant's New York City terminal at 531 East 169th Street, in the Bronx (R. 31, 35). It stands to reason that the maintenance of at least two terminals at opposite ends of the line proves that operations were between fixed termini and that is just what the Commission found when it made the order of June 20, 1938. The argument of this appellee at page 23 of its brief that appellant can only pick up passengers at a terminal and must take them to a point other than a terminal at the other end of the lines, is preposterous. The existence of at least two terminals establishes the fact that appellant operated over regular routes or be-

tween fixed termini. In this case there is no difference because there is only one road so that operations between fixed termini are operations over regular routes.

There is no comparison between appellant's operations and those of a taxi operator. A taxi operator rents his car to a person making a particular trip to a given destination at his own convenience. It really is a chartering of the entire vehicle by one party. Appellant sells tickets to any one and puts different people coming from different towns in the same vehicle. There is no more community of interest between the different passengers than there is between passengers on a railroad train going in the same general direction.

This appellee, like the others, incorrectly quotes from the advertising card printed at R. 80. That card shows operations to the fixed termini named, that service was daily, and that to those who might desire to secure boarding or rooming accommodations that same could be arranged. At R. 77 the advertising shows that service was daily and that trips were made to and from the mountains. At R. 78 the telephone number of appellant's terminal in Fallsburgh is printed showing that an office was maintained in Fallsburgh which is in the mountain area. No mention is made of any alleged door-to-door service but the advertisements, signs, cards, etc., all show a service to and from the offices of the appellant, which establishes that appellant's predecessors operated between fixed termini.

The affidavits of Mr. Feldman (R. 69) and Adela Dingelthal (R. 73) referred to by said appellee at page 24 do not change the picture at all, but support the appellant's claim to terminal operations between fixed termini.

The scope of the certificate is for the Commission to decide but in this case the Commission and the lower Court acted contrary to the evidence and without evidence to support the order and judgment complained of. In such

a situation, this Court has the power to act and does not substitute its judgment for that of the Commission.

**In Reply to Point III of the Brief of the Appellee, Hudson Transit Lines, Inc.**

Under this point appellee contends that appellant secured a hearing because it filed various petitions for reconsideration. The issuance of the order of September 2, 1941, without any evidence to support same has already been adequately discussed *ante*. Appellant desires to point out that the lower Court had no basis for finding that notice of a new hearing had been given (R. 29 Finding No. 6, R. 31). Appellant complains that the Commission had no basis for vacating the order of June 20, 1938 and making the order of September 2, 1941 without any evidence to justify such change, especially where the order of June 20, 1938 was issued over the exceptions of the predecessors of Mountain Trainsit Corporation (R. 101).

**Reply to Brief of Appellee, Mountain Transit Corporation.**

Mountain Transit Corporation, the appellee herein, is the successor to Yelloway Transportation Corporation, *et al.* The exceptions filed by said predecessors of Mountain Transit Corporation (R. 101) are the basis for the opposition of Mountain Transit Corporation herein.

The gist of the opposition of said appellee is the same as that of the other appellees and protracted discussion is unnecessary.

The appellant respectfully submits that the arguments submitted in reply to the briefs of the appellees, United States of America, Interstate Commerce Commission and Hudson Transit Lines, Inc., be deemed in reply to the various arguments of the appellee, Mountain Transit Corporation so as to avoid unnecessary repetition.

## CONCLUSION.

The briefs of the appellees do not in any wise change the situation with respect to the correct interpretation of Section 208(a) of the Motor Carrier Act of 1935 which was reenacted under the same number in the Transportation Act of 1940. The appellees proceed upon the assumption that the right interpretation of that section merely gives the appellant the right to add vehicles of the identically same size or type used on the grandfather date. The appellant contends that under Section 203(a) 13 and the proviso to Section 208(a) that it has the right to add motor vehicles of any kind or size which will increase its facilities and equipment within the express authorization of Congress. The type or size of the vehicle does not determine the type of service rendered especially in the instant case where it was found to have the right to operate from terminals (R. 30-35), and that such finding indicates that the operations of the appellant were between fixed termini and therefore the order of June 20, 1938 was the proper order to have been issued herein. Appellant submits that the judgment rendered herein should be reversed and that the order of September 2, 1941, be set aside, and the order of June 20, 1938 be reinstated.

Respectfully submitted,

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*Crescent Express Lines, Inc.*

Dated: November 18, 1943.